community under that name. It is manifest that the petitioner's own marriage is irretrievably broken and that there can be not the slightest possibility of the parties to that marriage ever coming together again. In those circumstances, it seems to me to be in the interests of all parties concerned — and not contrary to the interests of public policy — that I should grant a decree nisi which will enable the parties — even at this late stage — to regularise by marriage the irregular relationships which have been subsisting for many years past.

In those circumstances and, as I have said, with considerable doubt as to whether I ought to do so, I propose to exercise my discretion in the petitioner's favour and to grant the decree nisi in this case.

Decree nisi granted.

KUPPU v. BROWN & ANOR.

[C. A. (Hill Ag. C.J., Good and Ong JJ.) July 21, 1959]

[Penang — F.M. Civil Appeal No. 5 of 1959]

Landlord and tenant — Licensee or tenant — Control of Rent Ordinance, 1956 — "Intention" of owner — House built upon land — Whether creates any interest in land — Declaration — Mandatory order for possession.

The appellant in this case contended that by virtue of the building of a house upon the land by his predecessor he had acquired rights as a tenant and was protected from eviction under the Control of Rent Ordinance. Secondly, there was no proper notice terminating the tenancy.

The respondents contended that there was no intention on their part to create a tenancy or to give the occupier anything more than a bare license revocable at will. To ensure that the occupants of the land would not acquire prescriptive title by way of possession an annual fee varying from $2 to $3 was demanded.

Held (Hill Ag. C.J. and Good J., Ong J. dissenting): (1) the question whether a person is a tenant or a licensee is a question depending upon the intention of the parties and the law does not impute intention to enter into legal relationships when the circumstances and conduct of the parties negative any such intention;

(2) the expression 'annual rental' contained in the 'Conditions' printed on the back of the "Temporary Occupation Licence, Dwelling-House", did not estop the owners from offering the explanation that although described as "rental" the payment was in effect a licence fee.

Per Ong J. (dissenting): on evidence presented by the plaintiffs (respondent in the case) and accepted, the plaintiffs have not discharged the onus on them of proving that the defendant was on the land as a licensee, whose license was removable in the manner it was purported to have been terminated.

Cases referred to:—

(1) *Booker* v. *Palmer* [1942] 2 All E.R. 674.

(2) *Errington* v. *Errington* [1952] 1 All E.R. 149, 155.

(3) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

(4) *Montgomerie & Co. Ltd.* v. *Wallace-Jones* [1904] A.C. 73, 75.

(5) *Lee* v. *Lancashire Yorkshire Railway Company* (1871) L.R. 6 Ch. App. 584, 535.

(6) *Huckle* v. *London County Council* (1910), 26 T.L.R. 580.

(7) *Oliver* v. *Nautilus Steam Shipping Co.* [1903] 2 K.B. 639, 648.

(8) *Addiscombe Gardens Ltd.* v. *Crabbe* [1957] 3 All E.R. 513, 571.

(9) *Robins* v. *National Trust Co. Ltd.* [1927] A.C. 515, 520.

COURT OF APPEAL.

Ong Huck Lim for the appellant.

L. E. Osman for the respondent.

Hill Ag. C.J.: The issue before the learned trial Judge was whether the appellant was a licensee or a tenant of the respondents who have prayed for a declaration that appellant's right to use their land had been determined and for a mandatory order for possession.

The appellant's case was that he was a lawful tenant of the land paying an annual ground rent of $2 per annum and that he was protected from eviction under the Control of Rent Ordinance. The respondents' case was that the appellant had no more than a licence to occupy the land and that such licence had been duly determined.

On the facts and on the law the learned trial Judge was wholly satisfied that the appellant was merely a licensee and that his licence had been duly determined. He accordingly gave judgment for the respondents as prayed. From this judgment the appellant appealed.

The facts of the case are really quite simple. There are about 1,000 houses, including the appellant's, built on Glugor Estate, the property of the respondents. The occupiers of these houses pay $2 or $3 annually in respect of the land occupied by each house. This custom has been apparently in existence for 20 years or more and precedes the Japanese occupation.

It was during the occupation that the appellant purchased a house and cowshed from the previous owner and went into occupation.

The second respondent Hugh Reginald Watts described in general terms the practice of the estate. It would appear that there was no express agreement between the appellant and the respondents, at any rate none was shown to have been made.

Indeed, when the appellant went into occupation the respondents were not in the country.

Bearing in mind that Mr. Watt's evidence was accepted by Rigby J. to the effect that from before the war occupation of the estate land was by licence, it seems tenable that when appellant purchased the erections and went into occupation he was in fact a mere trespasser if, as appears to have been the case, the previous owner was a licensee. Subsequently his position seems to have been regularised by his being accepted as a licensed occupier.

Mr. Watts stated that he had worked on this estate for the last 25 years. The appellant's house was in a coconut estate belonging to the respondents. Mr. Watts said that the practice was to give a licence for a year to persons not working on the estate to come on to the estate

and build a house in the coconut area on a particular pre-arranged site. The sites were arranged to suit the convenience and advantage of the estate and to give effect to the belief that, to quote the words of Mr. Watts, "coconuts grow best within the sound of the human voice". In order to protect the owners of the estate from such occupants of the land acquiring any prescriptive title by way of possession — and also to assist in paying any administrative costs — an annual fee varying from $2 to $3 was demanded from these persons who had been permitted to come on to the land in this manner.

Exhibit P/2 dated 14.4.48 was issued to the appellant as a House Permit and reads "Kuppu has permission to occupy the land on which house No. G 2-50 stands at an annual rental of $2 two dollars for the year." In 1953 on the back of a receipt issued to the appellant certain conditions were printed under the heading "Temporary Occupation Licence". This is Exhibit P/1.

It was on this evidence that the learned trial Judge came to the conclusion stated above. In the course of his judgment Rigby J., referred to *Booker* v. *Palmer*[1] and to the judgment of Denning L.J. (as he was) in *Errington* v. *Errington*[2] where it is stated:—

". . . . . if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee".

The learned trial Judge stated, and I respectfully agree, that the authorities make it abundantly clear that the question whether a person is a tenant or a licensee is a question depending upon the intention of the parties and the law does not impute intention to enter into legal relationships when the circumstances and the conduct of the parties negative any such intention.

It seems to me that the crucial question in this instance was whether, by whatever method, the appellant had been granted a personal privilege with no interest in the land. I think the answer to that question must be in the affirmative. There was no evidence regarding the type of erection purchased by the appellant, but from my knowledge of local conditions and taking into consideration the price I must presume that they were the usual type of moveable structures. As such they can hardly be put forward as creating for the appellant an interest in the land. From the circumstances and from the conduct of the parties I cannot conclude or infer otherwise or that it was their intention to enter into an annual tenancy and I agree with the conclusions of the learned trial Judge. I would therefore dismiss this appeal with costs to the respondents as agreed.

In conclusion I feel I should express the opinion, and hope, that the appellant will be given, if this is still necessary, a reasonable time to remove and not less than three months.

Good J.: I need not re-state the facts; they are set out in the judgment of the learned Acting Chief Justice which I have had the advantage of reading.

The real question which had to be ascertained in this case was the intention of the parties to a mutual arrangement between the owners of the estate and the appellant's anonymous predecessor. It is clear from the evidence of Mr. Watts who is one of the co-owners that, on his part at all events, there was no intention to create a tenancy or to give the occupier anything more than a bare licence revocable at will. It does not necessarily follow from the fact that the appellant's predecessor built a house upon the land that he thought he had acquired rights as a tenant. The desire in mankind for a place of one's own — a roof over one's head — is so strong that men will build dwellings on land over which they have only the flimsiest claims to occupancy. The urge to build has in this country created what is known as the "squatter" problem, and the erection of dwelling houses on State land and land held under Temporary Occupation Licences issued by Collectors of Land Revenue has caused much litigation, generally resulting in decisions disadvantageous to the squatters.

The intention of the owners was that these licences should be personal to the occupiers. The occupation of the land in question in these proceedings changed hands for consideration during the Japanese Occupation when the owners were not in a position to prevent it. On resuming control of their own property, they accepted the appellant as occupier in place of the person to whom permission to occupy had originally been granted. The document, exhibit P.2, described as a "house permit," which was issued to the appellant in 1948, is in form and substance consistent with the view that it was a mere ratification of the existing position which the owners had accepted. The use of the expression "annual rental" does not estop the owners from offering the explanation that although described as a "rental" the payment was in effect a licence fee. The document, exhibit P.1. which is described as a "temporary occupation licence," was clearly an attempt on the part of the owners to place these occupation licences on a more businesslike basis, and detailed conditions of occupation were attached to this form of licence. Condition 4 reads:—

"This licence does not create the relationship of landlord and tenant. Upon the determination of this licence the occupier shall be entitled to remove the house."

It might be argued that this was an attempt to deny *ex post facto* the existence of a relationship which the owners suspected might inadvertently have been created by their pre-war arrangements with the occupiers. It seems to me, however, to be equally consistent with the view that it was merely a confirmation and re-statement in express terms of the *status quo* as it was understood by the parties to the arrangement.

In my view, the right conferred upon the appellant to remove the building when called upon to vacate the land clearly indicates that no relationship of landlord and tenant was created by the form of licence issued in 1953, and there was sufficient evidence from which the learned trial Judge was entitled to infer that no such relationship existed before the issue of licences in that form. I have come to the conclusion therefore that once the learned trial Judge had accepted the evidence of Mr. Watts (as he did), the plaintiffs had discharged the onus of proving that the defendant occupied the land by virtue of a bare licence personal to himself. I have examined carefully the evidence given by the appellant and, although he refers throughout to "rent", "annual rent", and "annual ground rent", I do not consider that there is in his evidence anything which would establish as a matter of probability that he was a tenant of the owners. In my opinion the learned trial Judge was entitled to find, as in effect he did find, that what the appellant bought from his predecessor was a moveable dwelling without any interest in the land on which it stood.

I therefore agree with the conclusion reached by the learned Acting Chief Justice, and would dismiss this appeal with costs to the respondents as agreed.

Finally, I wish to associate myself with the hope expressed by the learned Acting Chief Justice that the appellant will be given a reasonable time to remove the house and his effects off the land.

Ong J.: This is an appeal against the decision of the High Court at Penang whereby, in effect, the plaintiffs were given repossession of the portion of their land which is occupied by a house, the property of the defendant.

In their statement of claim the plaintiffs stated that they are and were at all times in possession of land known as Glugor Estate, Bayan Lepas, Penang, on part of which stands a dwelling house belonging to the defendant; that defendant occupied the same under a licence to come on the land and to erect thereon a dwelling house in consideration of an annual payment of $3; that defendant had defaulted in his payments since January 1, 1954; and that one month's notice in writing was served on the defendant on December 26, 1957, to remove his house and leave the said land, but he nevertheless continued to remain wrongfully thereon. The plaintiffs prayed for a declaration that the defendant's right to use the plaintiff's said land had been determined, and for a mandatory order to defendant to remove his house and an injunction to restrain him from using the said land.

In his defence the defendant contended that he was a lawful tenant of the portion of land in question at an annual rent of $2; he admitted non-payment of rent, but stated that it was the practice of the plaintiffs to collect the rent once in two or three years, but they had neither called to collect the rents since 1954 nor made demand in any way. He denied service of the notice and claimed the protection of the Control of Rent Ordinance.

Upon the main issue the learned trial Judge came to the conclusion that on the facts, as well as in law, the defendant was merely a licensee and not a tenant, and that the defendant's licence to occupy the land had been duly determined. His Lordship accordingly gave judgment for the plaintiffs.

The defendant's appeal is on two grounds, firstly, that the true relationship between the parties was that of landlord and tenant, so that the defendant was entitled to invoke the protection of the Control of Rent Ordinance, and secondly, that there was no proper notice terminating the tenancy.

The facts of this case are in their nature quite simple, and may be stated briefly. The only knowledgeable witness undoubtedly is the second plaintiff, Hugh Reginald Watts. He has been on Glugor Estate approximately 25 years, and there are about 1,000 houses built on the estate (including the defendant's) the occupiers of which pay to the plaintiffs $2 or $3 annually in respect of the land occupied by each house. Exactly how many years ago such an arrangement for occupation of the plaintiffs' land started is not stated in his evidence. It may very well have been before he came on the estate; but it certainly dated back to the years which preceded the Japanese Occupation. Mr. Watts had no particular recollection as to the defendant, and it is not expected that he would — of this, or of any other occupier of the estate land — but the learned trial Judge has accepted and found as a fact that the defendant owned and occupied his house on the estate for a considerable number of years, having purchased the house with an adjoining cowshed from its previous owner 15 years ago, that is to say, during the Japanese Occupation.

According to Mr. Watts the practice was to give a licence for a year to persons not working on the estate to come on to the estate and build a house on the coconut area on a particular prearranged site. The sites were arranged to suit the convenience and advantage of the estate. In order to protect the owners of the estate from such occupiers of land acquiring any title by prescription — and also to assist in paying administrative costs — an annual fee varying from $2 to $3 was demanded from those persons who had been permitted to come on to the land in this manner.

No express agreement was shown to have been made between the plaintiffs and the defendant, nor was evidence given as to the terms agreed between the plaintiffs, or the then estate owners, and the defendant's predecessor, whose identity was unknown. All that Mr. Watts was able to depose to was as to the practice of the estate in general terms. He relied upon certain "Conditions" printed on the back of a printed form (Exhibit P. 1) entitled "Temporary Occupation Licence, Dwelling-house", issued to the defendant

as occupier by way of receipt for his annual payment. This bears a date in 1953. Before the type of receipt examplified by Exhibit P. 1 came into use, it was in evidence that on April 14, 1948 a "House Permit (Exhibit P. 2) was issued to the defendant in the following terms: "Kuppu has permission to occupy the land on which House No. G2 - 50 stands at an annual rental of $2 (Two Dollars) for the year . . . .". There were no conditions on the back as in Exhibit P. 1.

Upon this evidence the learned trial Judge came to the conclusion that on the facts and in law the defendant was merely a licensee. With the greatest respect, I think that on the evidence presented by the plaintiffs and accepted in toto, the plaintiffs have not discharged the onus on them of proving that the defendant was on the land as a licensee, whose licence was revocable in the manner it was purported to have been terminated.

I am emboldened to differ from the learned Judge's finding of fact by what their Lordships in the House of Lords have said in *Benmax* v. *Austin Motor Co. Ltd.*[3]. There Viscount Simonds quoted Lord Halsbury L.C. in *Montgomerie & Co. Ltd.* v. *Wallace-Jones*[4]:

> "But when no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judge of an Appellate Court".

And Lord Reid says:

> "In cases where there is no question of the credibility of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial Judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion".

I now proceed to state my reasons for reaching the conclusion I do. Firstly, the intrinsic evidence from the receipts issued in 1948 and 1953 show that the conditions printed on the back of the 1953 receipts were introduced after 1948, if not as late as 1953. It is clear that years after a person has moved on to the land and built thereon, the character of his occupation cannot be changed unilaterally by the plaintiffs at their pleasure, but only by mutual agreement between the parties, of which there is no evidence. The introduction of conditions of the holding by means of having them printed on the backs of receipts which are given to occupiers cannot be held to be binding on them in law.

With the greatest respect to the learned trial Judge, it appears to me that he arrived at his decision as a result of attaching undue importance to these receipts. In point of law a receipt is only evidence of payment of a sum of money; it does not amount to a contract (though purporting to be discharge of a claim); it has not the effect of an estoppel; the true facts can be, and have to be proved and the real intention of the contracting parties ascertained. It is hardly necessary to refer to any authorities for these propositions, but if any authorities are required it is enough to refer to *Lee* v. *Lancashire Yorkshire Railway Company*,[5] *Huckle* v. *London County Council*[6] and *Oliver* v. *Nautilus Steam Shipping Co.*[7].

Secondly, Rent Control legislation was first enacted in Penang by the Increase of Rent (Restriction) Ordinance, which came into force on October 30, 1939. That Ordinance was subsequently repealed and replaced by the Malayan Union Ordinance No. 6 of 1948, which is now replaced by the present Control of Rent Ordinance, 1956. Problems of rent control and those arising out of restrictions on the right of landlords to eject their tenants never appeared so as to obtrude themselves upon the attention of landlords until after the end of the Japanese Occupation, as a perusal of our Law Reports will show. The distinction between a tenancy and a licence, to my mind, never occurred to the plaintiffs (or the estate owners) when they first threw their land open to occupation for erection of dwelling houses. If, then, the relationship between the owners of Glugor Estate and occupiers of land in this estate — other than that of making an annual payment exigible so as to prevent acquisition of title by prescription — never in fact fell to be considered, it seems to me that the acts and conduct of the parties provide the only evidence from which the Court has to infer what the true relationship was between the parties. I do not think it can be denied that the defendant has had at all times during the past 15 years exclusive possession of the area occupied by his house. On this point Denning L.J. (as he then was) says in *Errington* v. *Errington*[2]:

> "We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees . . . . . The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. *Parties cannot turn a tenancy into a licence merely by calling it one.* But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held to be only a licensee".

I should refer also to what was said by Jenkins L.J. in a later case: *Addiscombe Gardens Ltd.* v. *Crabbe* [8]

> "It seems to me that, save in exceptional cases of the kind mentioned by Denning L.J., in that case" — that is, *Errington* v. *Errington* — "the law remains that the fact of exclusive possession, if not decisive against the view that there is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance."

Paraphrasing with modifications, what Jenkins L.J. said in his judgment in the same case, in which a document fell to be considered, instead of, as here, the acts and conduct of the parties evidencing a parole agreement, in my opinion if the arrangement between the parties in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on a grantor the rights and obligations of a landlord, then it must be given the appropriate effect, that

is to say, it must be treated as a tenancy agreement as distinct from a mere licence.

In this case the intention of the parties has to be inferred from the circumstances and conduct of the parties. No evidence was given as to the intention of the estate owners at the time the defendant's predecessor was allowed to enter into occupation and build. It certainly could not have been the grant of a bare licence in the nature of an indulgent permission such as, for example, to enter upon and use the land for temporary storage of goods. The admitted intention was that a dwelling house should be built upon a site designated and arranged to suit the convenience and advantage of the estate. The cost of constructing a dwelling house was, for the party expending the money, not an inconsiderable outlay, and in my opinion no reasonable person would have been willing to incur such expenditure without having an assurance of some degree of permanence for his occupation, and some assurance that he would not be arbitrarily ordered to remove his dwelling-house and himself at short notice. Such being the case, it seems to me that at the very lowest, what the estate owners intended to grant to occupiers of their land and they intended to accept was a tenancy from year to year.

Furthermore, it is clear from the facts that what the estate owners granted to the defendant's predecessor could not have been a licence because a licence is not assignable by the licensee, and consequently the defendant could not have acquired the rights of his predecessor by purchase. Nevertheless the plaintiffs have accepted the defendant as lawfully in occupation over the years and on that basis collected rent from him from time to time until 1953. They are now estopped from maintaining the contrary to be true.

In the result, therefore, there was evidence of exclusive possession, which is at least strong *prima facie*, though not decisive, evidence of tenancy. Then there were the annual payments, which are referable as much to a payment of rent by a tenant, the reddendum, as to payment of a fee for a temporary occupation licence, and therefore quite ambiguous.

Such being the state of the evidence after hearing both parties, I would, with respect, follow the principle stated by Lord Dunedin in *Robins* v. *National Trust Co. Ltd.*[9],

"Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he was born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it Judge or Jury, will often find that the onus is sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter".

Consequently, even if there was not a preponderance of evidence in favour of the defendant — which I think is to be found in the case here — the evidence pro and con was evenly balanced, and the onus on the plaintiffs not having been discharged by them, in my opinion judgment should have been given for the defendant.

As to the question of notice, it has been conceded by Counsel at the trial that if the Court held that there was a tenancy, no proper notice had been given. In any event a yearly tenancy cannot be terminated by a month's notice.

I would therefore allow the appeal with costs here and costs of the trial which had been agreed at $500.

Appeal dismissed.

Solicitors: *Ong Huck Lim & Co.*; *Presgrave & Matthews.*

FOO YIN SHANG & ANOR. v. FOO YIN FONG & ORS.

[O. C. J. (Good J.) November 19, 1959]

[Ipoh — O. S. No. 152 of 1958]

Trust and Trustees — Shares in Limited Company — Exercise of voting rights attached to trust shares — Unanimity of trustees.

Practice and Procedure — Originating Summons — Whether applicable to proceedings between co-trustees — R.S.C. 1957, O.55 rr.3 and 5.

A testator, by his will, appointed the two plaintiffs and the 1st defendant as his executors and trustees. The assets of the testator's estate include 81,200 shares in a limited company. Differences arose as to the election of a director to the board of the company. The 1st defendant, whose name stood first in the register of shareholders in respect of the 81,200 trust shares, was by virtue of Article 76 of the Articles of Association of the company alone entitled to vote in respect of these shares. Using the 81,200 shares at his own discretion the 1st defendant secured the election of one F.Y.L. by a majority of 124,860, whereas if the 81,200 votes had been cast the other way the election would not have been carried. The two plaintiffs, who were the other two co-trustees of the estate, regarded the election of F.Y.L. as unsatisfactory and sought to make the 1st defendant exercise the voting rights according to their directions (they being the majority).

It was submitted on behalf of the first defendant that the Court had no jurisdiction to grant the relief sought on an originating summons as 0.55 did not contemplate proceedings between co-trustees; and an originating summons taken out for purposes connected with a trust must be by trustees against beneficiaries or *vice versa*.

Held: (1) 0.55 rr. 3 and 5 is applicable to proceedings brought by one trustee as plaintiff against a co-trustee as defendant, where the trustees cannot agree in a matter falling within the administration of the trust. Accordingly the Court has jurisdiction to grant the relief sought on an originating summons;

(2) the 1st defendant could not be coerced into exercising his discretion in a particular way (*Tempest* v. *Lord Camoys* [6] applied *Butt* v. *Kelson* [8] distinguished). But it is a well-settled principle that the trustees must act in unison. Therefore the 1st defendant should not exercise the voting rights attached to the 81,200 shares belonging to the testator's estate except in accordance with the unanimous decision of all three trustees. If the